No. 94269-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EL CENTRO DE LA RAZA, a Washington non-profit corporation; LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; INTERNATIONAL UNION OF OPERATING ENGINEERS 609; AEROSPACE MACHINISTS UNION, IAM&AW DL 751; WASHINGTON STATE LABOR COUNCIL, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS UNION 21; WASHINGTON FEDERATION OF STATE EMPLOYEES; AMERICAN FEDERATION OF TEACHERS WASHINGTON; TEAMSTERS JOINT COUNCIL NO. 28; WAYNE AU, PH.D., on his own behalf and on behalf of his minor child; PAT BRAMAN, on her own behalf; and DONNA BOYER, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANTS' RESPONSE TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

The seven *amicus curiae* briefs filed by pro-charter organizations and individuals ("Pro-Charter Amici")[1] advocate for the abandonment of constitutional principles that have defined the State's public school system since statehood. Washington's founders drafted a Constitution imposing a paramount duty on the State to make ample provision for education through a general and uniform system of public schools, comprised of common schools providing a general education to all children, as well as supplemental schools providing specialized educational programs to discrete student populations. Const. art. IX, §§ 1, 2. The Constitution requires the Legislature to dedicate necessary funds and revenue to the exclusive support of the common schools. Const. art. IX, §§ 2, 3. The Constitution also places all public schools under the supervision of an elected Superintendent of Public Instruction ("Superintendent"). Const. art. III, § 22.

Rather than address the constitutional issues in this case, the Pro-Charter Amici paint an irrelevant and misleading picture of charter schools

[1] Pro-Charter Amici are Washington Roundtable ("Roundtable"); National Association of Charter School Authorizers ("NACSA"); Paul Hill, Robin Lake, and Daisy Trujillo (collectively, "Trujillo Amici"); National Alliance for Public Charter Schools, National Center for Special Education in Charter Schools, Black Alliance for Educational Options, and League of Education Voters (collectively, "Alliance Amici"); Wa He Lut Indian School & Black Education Strategy Roundtable (collectively, "WHL Amici"); John S. Archer, Phyllis C. Frank, and Jeffrey Vincent (collectively, "Vincent Amici"); and certain state legislators (the "Legislator Amici").

as a proven and reliable replacement for Washington's common schools. They rely on court decisions from other states that do not share Washington's unique constitutional protections or history. And they misrepresent the current common school funding model in an effort to sidestep *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 355 P.3d 1131 (2015), *as amended on denial of reconsideration* (Nov. 19, 2015) ("*LWV*").

The efficacy of the private charter model, where each charter school is its own privately operated education experiment, is a matter of significant debate. But that policy debate is wholly irrelevant to this case. And policy is not for this Court to decide. The Pro-Charter Amici's policy preferences cannot alter the duties and restraints imposed by the Constitution. Nor does their disagreement with *LWV* excuse the Legislature's failure to comply with this Court's holding that the General Fund cannot be used to pay for charter schools within the current common school funding model. Like the State's and Intervenors' arguments (collectively, "Respondents"), Amici's arguments do not alter the conclusion that the Charter School Act violates the Washington Constitution's stalwart protections for public education.

II. ARGUMENT

A. Several Pro-Charter Amici Raise Policy Arguments That Are Irrelevant to the Constitutional Claims at Issue.

Several Pro-Charter Amici advance policy arguments regarding the alleged effectiveness of charter schools, but these assertions are irrelevant, inaccurate, and biased. *See* Roundtable's Br. at 1, 6-12; Trujillo Amici's Br. at 3-19; WHL Amici's Br. at 5-15; NACSA's Br. at 13-14. As this Court explained before striking down Initiative 1240 ("I-1240") in *LWV*, the "merits or demerits of charter schools" are irrelevant to whether such schools comply with "the requirements of the constitution." *LWV*, 184 Wn.2d at 401; *see also Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, 51 Wash. 498, 505, 99 P. 28 (1909) ("*Bryan*") ("[Courts] have turned a deaf ear to every enticement, and frowned upon every attempt, however subtle, to evade the Constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail."); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014) (rejecting amici's factual assertions, policy arguments, and materials and decisions from unrelated cases in other jurisdictions). The Supreme Court in *LWV* criticized several of these same amici for merely addressing "perceived" benefits of charter schools, rather than relevant legal issues. *LWV*, 184 Wn.2d at 401 n.7. The same is true here.

The impropriety of the Pro-Charter Amici's policy arguments is exacerbated by their citations to various studies, reports, articles, and statistics that were not before the trial court below and thus not properly before this Court on direct review. *See, e.g.*, Roundtable's Br. at 4-8, 10-12; NACSA's Br. at 13 n.42, 13-14; Trujillo Amici's Br. at 7-19; Alliance Amici's Br. at 3, 7, 10-11, 13-15, 18; WHL Amici's Br. at 2, 5-10, 12-15. These amici improperly rely on these materials to make assertions about the efficacy of charter schools. *See* RAP 9.12 (appellate court reviewing trial court's grant or denial of summary judgment "will consider only evidence and issues called to the attention of the trial court"); *Wuthrich v. King County*, 185 Wn.2d 19, 25 n.2, 366 P.3d 926 (2016). For example, they erroneously claim that charter schools provide "improved educational outcomes," Roundtable's Br. at 7, at "higher rates" than public schools, Trujillo Amici's Br. at 10. But those assertions are based on inaccurate exaggerations of various studies. CP 3441-43. Further, the studies themselves are also substantially flawed, involving "questionable techniques" and "reported effects that are insignificant in magnitude." *Id.* Scholarly research on charter schools has shown a failure to produce better results, higher attrition levels, improper practices, and substantial economic damage to public schools. CP 3443-45. Some of these harms have already begun to appear in Washington. CP 3445, 3598-3611.

Regardless, the effectiveness of charter schools remains a matter of significant debate. *See* Appellants' Reply at n.4-5, 9-10; CP 3439-3636 (compiling authority regarding effectiveness of charter schools and their impact on traditional public schools). In fact, the Bill and Melinda Gates Foundation—one of the most significant funding sources for the charter school movement in Washington, including several Intervenors and Pro-Charter Amici, *see* CP 3418—recently announced a shift in funding priorities away from charter schools to support traditional public schools based, in part, on the Foundation's goal to impact as many students as possible and, in particular, to ensure that "low income students and students of color…have equal access to a great public education that prepares them for adulthood," *see* Louis Freedberg, EdSource, *In strategy shift, Gates Foundation to spend bulk of education dollars on 'locally driven solutions'* (Oct. 20, 2017) (reporting that the Gates Foundation will spend 85% of the $1.7 billion dedicated to K-12 initiatives over the next five years on traditional public schools, with the remaining 15% for charter schools). The influence of wealthy elites, who have been interested in privatization and private development opportunities in public education but (unlike the State) have no obligation to sustain their funding for charter schools, should give this Court pause. *See, e.g.*, CP 3446-47, 3619-36, 3639-40, 3651-92, 3719-24.

B. The Alliance Amici Rely on Out-Of-State Decisions from States that Do Not Share Washington's Unique Constitutional Protections or History.

The Alliance Amici improperly rely on out-of-state authority upholding charter laws as evidence that Washington's Charter School Act does not violate the "general and uniform" requirement under Article IX, Section 2 of the Washington Constitution. Alliance Amici's Br. at 2-20 (Colorado, California, Michigan, Ohio, New Jersey, and North Carolina). The other states' legislatures, however, are not subject to comparable constitutional restraints as the Washington Legislature. In particular, none of the other states' constitutions require a uniform public school system and place common schools, open to all children and subject to voter control, at the heart of the public school system, with optional specialized schools (high schools, normal schools, and technical schools) to supplement the general common school education. Appellants' Opening Br. at 19-20.

For example, Michigan's constitution lacks both a uniformity clause and a voter control requirement. Indeed, the Michigan Supreme Court has specifically distinguished the Washington Constitution and concluded that, unlike Washington, Michigan does "not have a requirement in our state constitution that mandates the school be under the control of the voters of the school district." *Council of Orgs. & Others for*

Educ. About Parochiald, Inc. v. Governor, 455 Mich. 557, 577, 566 N.W.2d 208 (1997) (citing *State v. Preston*, 79 Wash. 286, 289, 140 P.350 (1914)) (addressing constitutionality of Michigan's charter school act).

Similarly, New Jersey's constitution does not contain a uniformity clause. Nor does New Jersey's constitution include the concept of "common school." Instead, the New Jersey legislature is required to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4. The New Jersey decision cited by the Alliance Amici, *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. 174 (N.J. Super. Ct. App. Div. 1999) ("*Englewood*"), does not address uniformity of charter schools in terms of governance or educational offerings. Although *Englewood* rejected a constitutional challenge based on delegation, that challenge was not based on a claim of improper delegation of the state's paramount duty. *See id.* at 230-31. Moreover, New Jersey charter schools are required to follow "the core curriculum standards which must be met in order to satisfy" the constitutional education mandate. *Id*. at 207, 230-31. By contrast, the Charter School Act delegates the Washington Legislature's paramount constitutional duty to provide substance to the program of basic education

offered to all children to private organizations in violation of the unique provisions of Article IX of the Constitution. *See* Section II.E *infra*; Appellants' Opening Br. at 37-39; Appellants' Reply at 25-27.

Ohio's constitution also does not contain a uniformity clause, instead requiring the state legislature to "secure a thorough and efficient system of common schools throughout the State[.]" Ohio Const. art. VI, § 2; *see also Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 574, 857 N.E.2d 1148 (2006). Although the constitution references common schools, "[t]he term 'common schools' has been used in Ohio law for many years and is ordinarily understood to mean 'public schools,' or schools that are administered by public agencies and maintained from public funds." 1995 Ohio Op. Atty. Gen. No. 95-031 (citing Ohio Const. art. VI, §§ 2, 3). A "common school" within the meaning of the Washington Constitution, by contrast, "'is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district.'" *LWV*, 184 Wn.2d at 405 (quoting *Bryan*, 51 Wash. at 504).

Further, the Colorado legislature is not subject to similar constitutional constraints in the classes of schools that may exist within the public school system. Colorado's constitution makes no mention of common schools or optional specialized schools, requiring only a

"thorough and uniform system of free public schools throughout the state." Colo. Const. art. IX, § 2. Thus, Colorado's legislature has "unlimited power" to create parallel systems of publicly funded schools. *Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 928 (Colo. App. 2009) (citation omitted). Unlike Colorado, Washington's constitutional delegates defined the classes of schools within the public school system and, in doing so, restricted the Washington Legislature from creating a second, separate system of schools paid for by the public and serving the same general student population as the common schools, but lacking the key characteristics of common schools of voter control and uniform educational offerings. Appellants' Reply at 6-10.

Moreover, California's constitution has unique features distinct from the Washington Constitution. California's legislature must "provide a system of common schools by which a free school shall be kept up and supported in each district," including "all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them." Cal. Const. art. IX, §§ 5, 6. There is no express "uniformity" requirement. This leaves the California legislature with "broad discretion to determine the types of programs and services which further the purposes of education." *Wilson*

v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1135, 89 Cal. Rptr. 2d 745 (1999). Notably, however, a California court struck down a law that transferred control over certain public schools to a partnership consisting of a mayor, school district designees, and other parents and community leaders. *See Mendoza v. State*, 149 Cal. App. 4th 1034, 1059, 1064, 57 Cal. Rptr. 3d 505 (2007).

The Alliance Amici's reliance on North Carolina's constitution fares no better. For example, the Alliance Amici cite *City of Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890), to argue the uniformity requirement in North Carolina's constitution refers to the "entire system" of public schools. Alliance Amici's Br. at 12. Critically, however, the Alliance Amici ignore that North Carolina's Constitution neither defines the components of the uniform system nor references common schools. *See* N.C. Const. art. IX, § 2 ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools[.]"). The Alliance Amici's reliance on North Carolina's constitution is therefore misplaced.

Finally, Florida is one of the only states in the nation with a constitution that, like Washington's, declares that basic education for all children is the state's paramount duty, directs the state legislature to establish a "uniform" public school system, and requires local voter

control. Fla. Const. art. IX, §§ 1, 4. In *Bush v. Holmes*, 919 So.2d 392, 409-10 (Fla. 2006), the Florida Supreme Court held that a program providing public funding to private schools violated the state's constitutional duty to provide a uniform public school system. Much like charter schools, the Florida private schools did not have to follow uniform public school laws, including the standard curriculum for basic education. *Id*. The *Bush* court's decision hinged on Florida's constitution, which (like Washington's) prohibited the diversion of public school funds to a parallel system of schools operated by private organizations. *See id.* In fact, a Florida appellate court also struck down a statewide charter commission that created a "parallel system of free public education escaping the operation and control of local elected school boards." *Duval Cnty. Sch. v. State*, 998 So.2d 641, 643 (Fl. Dist. Ct. App. 2008).

The Alliance Amici attempt to distinguish *Duval* as resting on the "total control" requirement in Florida's constitution. Alliance Amici's Br. at 13-14. But the *Duval* court specifically rejected the argument that a parallel charter school system was consistent with the Florida constitution's uniformity requirement. *Duvall*, 998 So.2d at 643-44 and n.3 (citing Fla. Const. art. IX, § 1(a)). Moreover, as Appellants have explained, local control is a critical feature of Washington's public school system. Appellants' Reply at 17.

Here, as in Florida, the Charter School Act creates a separate, parallel structure to existing common schools but with very different requirements, oversight, and control. This substitute for the general basic education provided by common schools was rejected by Washington's founders. The Act therefore violates the general and uniform system requirement of Article IX, section 2.

C. The Pro-Charter Amici Fail to Rebut that the Charter School Act Violates Article IX, Section 2.

Several Pro-Charter Amici also erroneously claim that the Act comports with the general and uniform requirement of Article IX, Section 2 by comparing charter schools to programs that are not at issue here. For example, certain Pro-Charter Amici compare charters to specialized schools in Washington that supplement common schools by serving populations with unique needs. *See, e.g.*, Trujillo Amici's Br. at 4-7; Roundtable's Br. at 5; Legislators Amici's Br. at 16, 22; WHL Amici's Br. at 4 n.5. But as Appellants have explained, this comparison is inapt. *See* Appellants' Reply at 10-12. Charter schools serve the general local population and are not restricted to discrete populations. RCW 28A.710.050(1). In fact, existing charter contracts show (1) no charters seek specifically to serve at-risk students above others, (2) no charters actually give a lottery preference to at-risk students, and (3) charters

recruit to meet the demographics of nearby common schools. Appellants' Reply at 12. Moreover, charter schools typically underserve disabled students and English language learners, including in Washington. *See* CP 3442, 3445, 3604, 3609-11.

Similarly, the WHL Amici erroneously compare charter schools to tribal compact schools. *See* WHL Amici's Br. at 5-11. Like Respondents, the WHL Amici ignore tribal schools' singular qualities. In particular, the WHL Amici ignore that tribal schools uniquely operate under a compact between the State and a sovereign tribal nation. Unlike other educational programs, tribal compact schools are not subject to the Washington Constitution, including Article IX, Section 2's general and uniform requirement. Appellants' Reply at 12. Nor do they acknowledge that tribal schools (unlike charter schools) are supervised by the Superintendent and specifically required to offer the same basic education program as common schools, including RCW 28A.150.220. *Id*. (citing ch. 28A.715 RCW). Ironically, while the WHL Amici emphasize the importance of culturally relevant curricula and acknowledge that the vast majority of Native American students attend common schools, charter schools are exempt from the uniform state law that requires Washington's common schools to incorporate the unique history, culture, and government of their

closest recognized tribe into the curricula. WHL Amici's Br. at 8-10; Appellants' Reply at 14 (citing RCW 28A.320.107(1)(a)).

Contrary to the WHL Amici's contention, the Legislature does not have discretion to replace common schools. WHL Amici's Br. at 4 (arguing the "primacy" of common schools "is a policy matter left for the Legislature to determine"). The primacy of common schools (which is not disputed by the State or Intervenors) is manifest in Article IX, which makes common schools the only mandatory component of the public school system and sets aside dedicated funds to ensure their vitality. Further, the constitutional delegates were "practically unanimous" in drawing up an education article that protected common schools above all educational institutions. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 672, 72 P.3d 151 (2003)*; see also* Quentin Shipley Smith, *Analytical Index to The Journal of the Washington State Constitutional Convention 1889*, at 686 (Beverly Paulik Rosenow ed., 1999) (rejecting amendment to Article IX that would have permitted the Legislature to use common school funds to support any "public schools," and instead restricted those moneys to support exclusively "common schools"). Contrary to this constitutionally mandated design, the Act establishes privately operated charter schools an "alternative" to common schools. *See* RCW 28A.710.020(1)(b).

The Legislator Amici similarly assert a degree of legislative discretion that does not exist in the context of public education, reprising the same arguments made by Respondents. *See* Legislator Amici's Br. at 15-22. The "general and uniform" requirement imposes important constraints on the Legislature in carrying out its constitutional duty to establish and fully fund public education for all Washington children. For example, as explained in Appellants' Reply, Appellants agree that local voter control could be accomplished via other local government entities operating public schools, including cities, towns, or counties. Appellants' Reply at 15 (citing *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 526, 219 P.3d 941 (2009)).[2] But this Court has repeatedly emphasized that local control is a key quality of the public school system. *Fed. Way Sch. Dist. No. 210*, 167 Wn.2d at 523; *Bryan*, 51 Wash. at 504; Op. Wash. Att'y Gen. 1978 No. 19 (Legislature's "intent to control," even "indirectly," a "school district['s] hiring decisions over staffing" would be an "intrusion into 'local control'"); *see also Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S. Ct. 3112, 3125-26, 41 L. Ed. 2d 1069 (1974) ("No single tradition in public education is more deeply rooted than local

[2] The Legislator Amici incorrectly contend that schools districts "are *nowhere* even mentioned in the Constitution." Legislator Amici's Br. at 22 (emphasis in original). To the contrary, the original and current versions of the Constitution refer to school districts multiple times. *See, e.g.*, Const. art. VII, § 2, art. VIII, § 6 (1889); Const. art. I, § 34, art. VII, §§ 1, 2, art. VIII, §§ 1, 6 (2017).

control over the operation of schools[.]"). Charter schools operated by private entities do not share this fundamental characteristic.

Finally, NACSA's argument that collective bargaining somehow undermines the requirement for a general and uniform system of public schools is also meritless. *See* NACSA's Br. at 18-20. Although NACSA's distaste for unions is apparent, the collective bargaining process does not take control away from voters as occurs under the Act. *See, e.g.,* Appellants' Reply at 17. The Court should disregard NACSA's attempt to distract from the important constitutional issues before it.

D. The General Fund Cannot Be Used for Charter Schools Because the Legislature Has Not Segregated Funds to Pay for Common Schools in a Restricted Account.

In defending the Charter School Act's funding mechanism, the Legislator Amici do not dispute the critical facts showing that the Act merely continues I-1240's unconstitutional diversion of restricted common school funds to charter schools. They do not dispute that the Legislature could have raised new revenue or cut existing programs to pay for charter schools, but chose not to do so. They concede that the Legislature could create a fully funded segregated account to pay for common schools but, as explained below, offer no evidence that such an account exists. Legislator Amici's Br. at 10. They do not dispute that the Legislature intends merely to swap funds and/or other programs between the General

Fund and the Opportunity Pathways Account ("OPA") to pay for the escalating costs of up to 40 charter schools over the next five years. To the contrary, they emphasize the Legislature's ability to "transfer moneys between funds and accounts." *Id*. at 10 n.9. Nor do they dispute that the Legislature relied on such a funding swap to pay for charter schools in the 2017-19 Budget. Thus, the Act's intended and current operation has the effect of using restricted common school moneys to pay for charter schools in violation of Article IX, Section 2. Appellants' Reply at 19-23.

Rather than address these dispositive facts, the Legislator Amici misrepresent Appellants' arguments concerning the constitutional constraints on common school funding and the State's budget process. Appellants do not believe, as the Legislator Amici contend, that the Constitution requires "a single fund, supported by a single revenue source, from which the Legislature appropriates money for public purposes, including public schools." Legislator Amici's Br. at 8.[3] To the contrary, Appellants agree with the Legislator Amici that Article IX contemplates that the Legislature will set aside sufficient state funds in a separate dedicated account to fund common schools. Appellants' Reply at 20. Appellants also agree with the Legislator Amici that the Legislature could

[3] Likewise, Appellants have never argued that there is a single state budget. Legislator Amici's Br. at 7. The Legislature enacts three biennial budgets (operating budget, capital budget, and transportation operating/capital budget), but only the operating budget is relevant to Appellants' constitutional claims.

have funded charter schools consistent with Article IX by creating and fully funding a segregated restricted account to pay for common schools. Appellants' Reply at 32; Legislator Amici's Br. at 15. (Such a funding scheme, however, would not address the uniformity and other constitutional infirmities of the Act.) The problem here is that the Legislature chose not to do so.

The Legislator Amici baldly claim that the Legislature deposits all restricted common school funds in a separate "common school fund," but they offer no evidence of this fund's existence. There is none. As this Court explained in *LWV*, the Legislature has not maintained restricted common school funds in a separate account since at least 1969. *LWV*, 184 Wn.2d at 409 (citing RCW 84.52.067; Laws of 1969, Exec. Sess., ch. 133, § 2) (emphasizing the "absence of segregation and accountability" in the current funding model). Instead, restricted common school funds for basic education come in and out of the General Fund. *See id.* at 408-09 (holding that all of the basic education funds for common school are protected under Article IX, Section 2). The Court determined that because of the co-mingling of restricted and non-restricted funds in the General Fund, the State cannot "demonstrate that these restricted moneys are protected from being spent on charter schools." *Id*. at 409. Thus, the Court rejected the

State's argument "that charter schools may be constitutionally funded through the general fund." *Id.*

The record in this case—including a declaration filed by the State from the Assistant Director of the Budget Division with the Washington State Office of Fiscal Management—confirms that the Legislature did not create a segregated account for restricted common school funds or otherwise alter the common school funding scheme after *LWV*. Neither the 2016 Supplemental Budget nor the 2017-19 Budget deposit money into or allocate money out of a segregated "common school fund." Consistent with recent practice, these operating budgets pay for common schools primarily from the General Fund. *See* Laws of 2016, 1st Spec. Sess., Supplemental Operating Budget (E2SHB 2376) ("2016 Supplemental Budget"), §§ 502-05, 509, 512, 513 (allocating basic education funding for common schools from General Fund-State Appropriation, General Fund-Federal Appropriation, and Education Legacy Trust Account ("ELTA")-State Appropriation); Laws of 2017, 3rd Spec. Sess., Operating Budget (SSB 5883) ("2017-19 Budget"), §§ 502-05, 507, 511, 514-15, 517 (same).[4]

[4] The 1967 amendment to Article IX, Section 3 establishing a separate fund for common school construction did not redirect all revenue from the permanent common school fund to construction. CP 2309. Although this may be the current practice, the amendment provides that rentals and certain other revenue derived from assets deposited in the permanent common school fund **after** 1967 continue to be dedicated exclusively

In *LWV*, the Court determined that the Legislature has comingled restricted common school funds with the General Fund. Challenging that determination, the Legislator Amici point to RCW 84.52.067 as evidence that the Legislature dedicates property tax revenues to "the common school fund," not the General Fund. Legislator Amici's Br. at 9 n.7. But RCW 84.52.067 proves the opposite, directing that "[a]ll property taxes levied by the state for the support of common schools **shall be paid into the general fund** of the state treasury" (emphasis added). RCW 84.52.067 does not mention any common school fund or restricted account. Further, none of the nearly 600 funds and accounts identified by the Legislator Amici segregate restricted basic education funds that pay for common schools under the current funding formulas. Legislator Amici's Br. at 10 (citing CP 579-643). Although the State Treasury maintains a "Permanent Common School Fund," the Legislature did not appropriate any money from the Permanent Common School Fund for common school operations in FY 2016. *See* CP 2314; CP 3647-49

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for common school operations. *See* CP 3041 (1966 Voters Pamphlet stating that construction funds are limited to, inter alia, "all rentals and other revenue…from lands and other property **presently devoted** to the permanent common school land" (emphasis added)).

(Comprehensive Annual Financial Report for FY 2016) (no distribution of revenues from Permanent Common School Fund to common schools).[5]

The "seminal book on the legislative process" relied on by the Legislator Amici confirms that common schools are funded from the General Fund, as well as certain other funds including the ELTA. Legislator Amici's Br. at 7 (citing Edward D. Seeberger, *Sine Die: A Guide to Washington State Legislative Process* xi (UW Press 1997)).[6] Importantly, this book identifies "public schools" as one of the "chief recipients **from the state's general fund**." CP 3706 (emphasis added). Simply put, a segregated "common school fund" is a figment of the Legislator Amici's imagination.

The Legislator Amici argue that the Legislature's "constitutional authority" over Treasury Funds trumps the constitutional constraints on common school funds. Legislator Amici's Br. at 9. But the Legislature's discretion in how to pay for public education is not plenary, i.e., unqualified or absolute. Legislative power is restrained by the Constitution, which directs the Legislature to establish common schools and provide adequate funding for common schools from restricted sources.

[5] As noted by Intervenors' retained accountant, the State's Comprehensive Annual Financial Reports are intended to "enable individuals to determine the sources and uses of funds for…governmental activities." CP 716.

[6] Excerpts of *Sine Die: A Guide to Washington State Legislative Process* can be found at CP 3694-3717.

Const. art. IX, §§ 1, 2. Indeed, the cases cited by the Legislator Amici acknowledge that the Legislature's budgetary power is limited by the Constitution. Legislator Amici's Br. at 10 and n.8-9 (citing, inter alia, *State ex rel. Decker v. Yelle*, 191 Wash. 397, 400, 71 P.2d 379 (1937); *State ex rel. State Employees' Retirement Bd. v. Yelle*, 31 Wn.2d 87, 105, 201 P.2d 172 (1948); *Wall v. State ex rel. Wash. State Legislature*, 189 Wn. App. 1046, 2015 WL 5090741, at *2 (Div. I Aug. 26, 2015) (unpublished), *review denied*, 185 Wn.2d 1015 (2016)).

The Legislator Amici's disagreement with *LWV* does not give the Legislature license to disregard this Court's holding that the General Fund cannot be used to pay for charter schools unless and until the Legislature segregates sufficient funds to pay for common schools. The Legislature has not created a segregated restricted common school account.

The Legislator Amici contend whether the Legislature will properly fund the Act in the future is "speculative" due to the two-year nature of the legislative budget cycle. *See* Legislator Amici's Br. at 13-14. This argument is a red herring. The Legislator Amici do not dispute that the Legislature intended to pay for charter schools by swapping money and/or programs between the OPA and the General Fund, and that it is **currently** doing so under the 2017-19 Budget. Instead, the Legislator Amici erroneously contend that the Legislature did not "support public

charter schools from funds earmarked by Article IX, § 3 for common schools." Legislator Amici's Br. at 14. This argument ignores this Court's holding that charter schools cannot be funded out of the General Fund, *see LWV*, 184 Wn.2d at 410, and ignores the Legislature's practice of treating the General Fund and OPA as a single pot of money, *see* Appellants' Opening Br. at 34 (citing CP 349, 351); Appellants' Reply at 23.[7] As such, the Legislator Amici fail to rebut the constitutional infirmity of the Act's funding scheme.

E. Several Pro-Charter Amici Fail to Address the Specific Authority Prohibiting Delegation of the State's Paramount Duty Under Article IX.

In arguing that the Charter School Act does not unconstitutionally delegate the State's paramount duty under Article IX, the Vincent Amici and NACSA repeat unmeritorious arguments already raised by Respondents. *See* Vincent Amici's Br. at 13-19; NACSA's Br. at 2-17. Thus, both the Vincent Amici and NACSA fail to comply with RAP 10.3(e), which requires amicus curiae briefs to "avoid repetition of matters in other briefs." Accordingly, because the Vincent Amici and NACSA primarily reiterate the same legal arguments made by Respondents, they should be given little weight.

[7] Despite contending that the OPA has "nothing to do" with the General Fund, the Legislator Amici fail to rebut the undisputed evidence in the record that the Legislature treats the two as a single pot of money for budgeting purposes. Legislator Amici's Br. at 12 n.12; CP 349, 351.

To the extent this Court considers the Vincent Amici's or NACSA's arguments on their merits, however, those arguments fail for the same reason as Respondents' arguments. *See* Appellants' Opening Br. at 37-41; Appellants' Reply at 25-27. Critically, neither the Vincent Amici nor NACSA address the specific Washington case law confirming that the State's paramount duty to provide substance to a program of basic education may not be delegated to another public entity, let alone to a private organization operating a charter school. *See* Appellants' Reply at 26 (citing *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 512-13, 585 P.2d 71 (1978) and *Seattle Sch. Dist. No. 1*, 149 Wn.2d at 673). This authority is dispositive of Appellants' claim, as the Act indisputably delegates the authority to provide substantive content to the basic education program used by charter schools to the private organizations operating those charter schools. *See id*.

Ignoring this authority, Amici repeat Respondents' flawed argument that there is no constitutional infirmity because charter schools must provide "a" program of basic education. For example, NACSA contends that the exemption of charter schools from compliance with RCW 28A.710.220 does not allow private charter organizations to "define" a program of basic education. *See* NACSA's Br. at 9-10. The constitutional duty of the Legislature to define, or in other words give

"substantive content to," a program of basic education has been repeatedly recognized in Washington case law. *See, e.g., Seattle Sch. Dist. No. 1 of King Cnty.*, 90 Wn.2d at 518; *McCleary v. State*, 173 Wn.2d 477, 521, 269 P.3d 227 (2012). Here, the Act requires charter schools to provide "a" program of basic education that meets only select minimum requirements, but does not require charter schools to comply with RCW 28A.710.220, the legislatively defined, constitutionally sufficient program of basic education. Thus, charter schools provide their own substance to "a" program of basic education and are not required to provide "the" program of education in RCW 28A.710.220. *See* Appellants Reply at 26. NACSA's argument to the contrary confuses the distinct concepts of "basic education" and "the program of basic education" and does not appear to understand the Washington cases requiring the Legislature to provide substance to the latter. *See* NACSA's Br. at 10-11.

The Vincent Amici also reprise Respondents' flawed reliance on the *in pari materia* method of statutory construction. *See* Vincent Amici's Br. at 16-18. For reasons already explained, the *in pari materia* method of statutory construction does not save the Act from violating Article IX, Section 2. *See* Appellants' Opening Br. at 28-29. Among other reasons, *in pari materia* does not apply here because it would render RCW 28A.710.040(2)(b)'s requirement that the program of basic education

include instruction in the essential learning requirements ("EARLs") superfluous. *Id.* In response, the Vincent Amici rely on *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 286 P.3d 46 (2012), where this Court found the superfluous doctrine not helpful where "both readings advanced by the parties are unsatisfying." Vincent Amici's Br. at 18 (citing *Perez-Farias*, 176 Wn.2d at 526). Thus, the Vincent Amici implicitly concede their reading of RCW 28A.710.040(2)(b) is unsatisfying. Regardless, the superfluous doctrine is but one of several reasons the Vincent Amici's reading of that provision is incorrect. *See* Appellants' Opening Br. at 28-29.

The Vincent Amici and NACSA also reprise Respondents' failed arguments that sufficient safeguards exist for the delegation of the State's paramount duty because authorizers must approve the program of basic education proposed by the private entities operating charter schools and because other standards exist for evaluating both the charter school applications and the operation of charter schools. *See* Vincent Amici's Br. at 6-9; NACSA's Br. at 9-14. But these types of post hoc approvals do not satisfy the requirement that the Legislature give substance to the program of basic education in the first instance. *See e.g.*, Appellants' Reply at 26-27. Accordingly, the Vincent Amici's and NACSA's delegation arguments should be rejected.

F. The Vincent Amici Ignore that the Act Divests the Superintendent of Supervisory Authority in Violation of Article III, Section 22.

The Vincent Amici incorrectly contend that the Act does not violate Article III, Section 22 of the Constitution. *See* Vincent Amici's Br. at 3-13. Initially, the Vincent Amici are all former members of the State Board of Education and do not have any legislative or legal experience that would afford them particular skill or insight in interpreting the Constitution or determining whether a legislative act is constitutional. *See* Vincent Amici's Mot. for Leave to File Amicus Curiae Br. at 1-3 (setting forth experience of individual amici). Nor do the Vincent Amici identify any relevant experience regarding the supervisory authority of the Superintendent or the Superintendent's authority to supervise schools receiving public funding. *See id*. Accordingly, their argument should be given little weight.

Regardless, the Vincent Amici's arguments fail on their merits. Like Respondents, the Vincent Amici ignore the provision of the Act that grants supervisory authority over charter schools to the Charter Commission, *see* Appellants' Opening Br. at 42 (citing RCW 28A.710.070(2)), and the provision establishing that the Commission is an "independent state agency," *see id*. (citing RCW 28A.710.070(1)). Thus, the Vincent Amici ignore that the Act places charter schools under the

supervision of an independent agency not subject to supervision by the Superintendent, in violation of Article III, Section 22. *See id*.

Instead, the Vincent Amici incorrectly rely on various specific statutory provisions from 1885-86 and 1889-90 to argue that the Superintendent's supervisory authority is somehow limited as provided by statute. *See* Vincent Amici's Br. at 4-13. It is a basic principle of Washington constitutional law, however, that the Legislature cannot restrict the qualifications or authority of constitutionally authorized officers. *See, e.g., Gerberding v. Munro*, 134 Wn.2d 188, 204-05, 208, 949 P.2d 1366, 1374 (1998) ("the legislature has full control over offices created by its enactment of a statute, whereas its power over constitutional offices is limited" (internal citation omitted)).

Moreover, the fact that the Legislature assigned specific duties to the Superintendent—both in the 1800s and today—does not support the conclusion that the Superintendent's authority is limited as a result. Rather, the duties assigned to the Superintendent in chapter 28A.300 RCW are consistent with the Constitution's broad delegation of supervisory authority to the Superintendent. *See, e.g.,* RCW 28A.300.030 ("The superintendent of public instruction … may require the assistance of educational service district boards and/or superintendents in the performance of any duty, authority, or power imposed upon or granted to

the superintendent of public instruction by law or by the Constitution of the state of Washington, upon such terms and conditions as the superintendent of public instruction shall establish.")

Regardless, the Vincent Amici's own conclusion regarding the meaning of the Superintendent's supervisory role prior to and after the ratification of the Constitution belies its own argument. Vincent Amici's Br. at 13 (concluding the 1884 dictionary definition of "supervise" meant "'to inspect, oversee'") (citation omitted). As Appellant have explained, Article III, Section 22 states in no uncertain terms that "**shall** have supervision over **all** matters pertaining to public schools[.]" *See* Appellants' Opening Br. at 41-44 (citing Const. art. III, § 22) (emphasis added)). The Vincent Amici's arguments to the contrary are meritless.

III. CONCLUSION

The Charter School Act is an unconstitutional law that violates the educational uniformity that the State's founders sought to protect, continues the diversion of protected common school funds, impermissibly delegates the State's paramount duty, and strips the Superintendent of supervisory authority. Accordingly, this Court should hold that the Act is unconstitutional as a matter of law.

RESPECTFULLY SUBMITTED this 7th day of November, 2017.

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